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IN THE

Supreme Court of the United States

October Term, 1962.

No. 1033.

RALPH J. TAUSSIG, Et Ux.,
Petitioners,

v.

WELLINGTON EQUITY FUND, INC., Et Al.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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TABLE OF CONTENTS

	Page
COUNTER STATEMENT OF THE QUESTION PRESENTED	1
STATEMENT OF FACTS	2
ARGUMENT	4
I. Defendants Acted in Good Faith and Their Actions Were Not Fraudulent	4
II. The Denial of an Accounting and Other Monetary Relief Was Fully Justified on the Record	8
III. Plaintiffs' Contentions as to the Issue of Unfair Competition Are Unsound But That Issue Should Be Reviewed by This Court by Granting Defendants' Petition	10
CONCLUSION	17

TABLE OF CASES CITED

	Page
Anheuser-Busch, Inc. v. DuBois Brewery Co., 175 F. 2d 370 (3rd Cir. 1949)	5
Champion Spark Plug Co. v. Sanders, 331 U. S. 125 (1947)	9
Consumers Petroleum Co. v. Consumers Co. of Illinois, 169 F. 2d 153 (7th Cir. 1948)	5
Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co., 316 U. S. 203 (1942)	9
Q-Tips, Inc. v. Johnson & Johnson, 206 F. 2d 144 (3rd Cir.), cert. denied, 346 U. S. 67 (1953)	10
Straus v. Notasemie Hosiery Co., 240 U. S. 179, 60 L. Ed. 590 (1916)	9

AUTHORITIES CITED.

	Page
Investment Company Act of 1940, 15 U. S. C. 80a-1 et seq:	
Generally	12
§ 35(d)	13
Lobell, A Critique of The Wharton School Report on Mutual Funds, 49 Va. L. Rev. 1 (1963)	14
The Mutual Fund and Its Management Company: An Analysis of Business Incest, 71 Yale L. J. 137 (1961)	14
A Study of Mutual Funds, Prepared for the Securities & Exchange Commission by The Wharton School of Finance & Commerce, H. R. Rep. #2274, 87th Cong. 2d Sess. (1962)	14

COUNTER STATEMENT OF THE QUESTION PRESENTED.

Is it error to deny damages and an accounting of profits upon a finding of unfair competition in the use of a trade name (i) when the unfair competition was not intentionally wrongful, (ii) when there has been no damage and no evidence of any profit resulting from the unfair competition and (iii) when the amount of any unjust enrichment from the unfair competition would be "the product of rank speculation."

STATEMENT OF FACTS.

Plaintiffs [1] appealed to the Court of Appeals for the Third Circuit from two orders denying monetary relief for the unfair competition found to exist by the District Court (530a, 531a). The Court of Appeals affirmed this denial of monetary relief. Plaintiffs' petition raises the issue of whether the Courts below were in error in denying monetary relief, but the greater portion of it is devoted to a discussion of the basic issue as to the existence of unfair competition. In effect, Plaintiffs join Defendants in requesting the granting of the *Defendants'* Petition for Certiorari in No. 924 which properly raises that issue. While we welcome Plaintiffs' joinder in that application, we do not accept the propositions which they advance in support thereof.

Because Plaintiffs' appeals related only to the denial of monetary relief, we will treat that issue first and establish that the real question relating to monetary relief (i) is not as presented by Plaintiffs and (ii) was properly disposed of by the Courts below in accordance with established principles of law and does not present a question appropriate for review by this Court. We will then discuss the assertions and contentions of Plaintiffs which go to the issue of unfair competition.

The first of these companies to adopt the Wellington name was Defendant The Wellington Company [2] which did

1. Plaintiffs are the Petitioners here and the Respondents in No. 924, October Term, 1962, hereafter referred to as No. 924, in which three of the four defendants are Petitioners. In order to avoid confusion resulting from the cross-petitions and the cross-references to the briefs in No. 924, we will refer to the parties either by name or by the original positions which they occupied in the litigation.

2. There are four Defendants: Wellington Fund, Inc., on whose behalf Plaintiffs brought this action; Wellington Equity Fund, Inc., the second mutual fund whose use of the Wellington name has been enjoined; The Wellington Company, which was the investment adviser to Wellington Fund and the national distributor or underwriter of the shares of both funds at the time the suit was brought; The Wellington Company, Ltd., which was and is the investment adviser to

so in July of 1931 (302a-303a; 539a). Walter L. Morgan, the owner of The Wellington Company, organized Wellington Fund in 1929 with the name "Industrial & Power Securities Co." In July of 1935, at Morgan's suggestion, the Fund changed its name to "Wellington Fund, Inc." (299a-300a, 307a, 309a). In 1958 The Wellington Company concluded that it would be desirable to have a second fund with different investment objectives and policies from those of the conservative Wellington Fund and it therefore caused Wellington Equity Fund to be organized (268a-269a, 326a-327a). Plaintiffs as shareholders of Wellington Fund objected to the proposed use of the Wellington name by the second fund (24a-33a). The Wellington Company, on the other hand, considered that it was making an entirely proper use of its own name by permitting Wellington Equity Fund to use it in the same fashion Wellington Fund had been permitted to adopt the name in 1935. This litigation resulted.

Although the Courts below have not denied that The Wellington Company was the first user of the name and that it has the right to continue to use the name for itself, they have held that The Wellington Company had no right to permit Wellington Equity Fund to use the name and have enjoined The Wellington Company from using the Wellington name with respect to any mutual fund other than Wellington Fund. Both Courts were satisfied that the equities of the case were fully served by the injunction and that no monetary relief was appropriate.

Wellington Equity Fund. Since The Wellington Company and The Wellington Company, Ltd. were commonly owned, we will, for the sake of simplicity, refer to The Wellington Company as if it were both the investment adviser and national underwriter for both Funds.

The Wellington Corporation, the original investment adviser to Wellington Fund, was also owned commonly with The Wellington Company. It ceased to be the adviser in 1952 at which time The Wellington Company became the adviser. As this corporate change is of no significance to the issues, we will, again for the sake of simplicity, treat The Wellington Company as though it had been the investment adviser to Wellington Fund from the time its predecessor, The Wellington Corporation, became investment adviser.

ARGUMENT.

I. Defendants Acted in Good Faith and Their Actions Were Not Fraudulent.

Plaintiffs assert that Defendants' use of the Wellington name for Wellington Equity Fund was "knowing, wilful, fraudulent" (Pet. p. 17); that the appropriation of the name was "not innocent" and was "intentional and deliberate" (Pet. p. 17); that there was a "wilful and fraudulent appropriation of Wellington Fund's name and goodwill" (Pet. p. 8); that Defendants' conduct was "intentionally fraudulent" (Pet. p. 2); and that the District Court held that Defendants "wilfully appropriated the name and goodwill of Wellington Fund for their own advantage" (Pet. p. 3).

The facts are to the contrary. The Wellington Company acted in complete good faith and had no intention of appropriating any asset of Wellington Fund or of injuring Wellington Fund in any respect. The record fully substantiates these facts and the District Court did not hold otherwise. Plaintiffs' constantly repeated charge of wilful wrongdoing is wholly without foundation.

The use of the name by Wellington Equity Fund was, of course, deliberate and intentional. The District Court held that this was wrongful and constituted unfair competition. The Plaintiffs' joinder of these two facts, however, creates a distorted and unfair impression. Three different grades of conduct are recognized in this field of law; (i) the deliberate copying of another's symbols with intent to trade on his reputation; (ii) the adoption of similar symbols with knowledge of the prior use but in a mistaken belief that there is no unfair competition and without any intentional trading on the reputation of the prior user; (iii) the adoption of symbols without knowledge of any prior use. In each case, the defendant is a wrongdoer. Only in the third

situation can he be described as "innocent". However, only the first is a deliberate and intentional wrongdoer as to whom more stringent sanctions are applied. In the second situation, the defendant is not "innocent" because he has knowledge of the facts which constitute the wrong. However, he does not *intend* to commit a wrong, the wrong is not wilful, and the courts do not apply to him the stringent sanctions which are applied to the intentional wrongdoer; *Anheuser-Busch, Inc. v. DuBois Brewery Co.*, 175 F. 2d 370, 376, 378 (3rd Cir. 1949); *Consumers Petroleum Co. v. Consumers Co. of Illinois*, 169 F. 2d 153, 164 (7th Cir. 1948).

The best authority for our assertion that there was no deliberate wrongdoing in this case is Plaintiffs' own counsel who represented to the District Court at pre-trial conference as follows:

> "I would hasten to add, sir, that in this suit we are by no means intending to in any way impugn the integrity or the good faith of the officers and directors involved. On the contrary, they have performed in exemplary fashion in the years in which they have managed and directed Wellington Fund, Inc." (Appendix of these Defendants in the Court of Appeals, page 6b.)
>
> "We certainly intended, sir, that the entire complaint be cast in form of a declaratory judgment because we are not suggesting or alleging any fraud on the part of the individuals." (Id. p. 16b; see also Exhibit "C" to the Complaint, 31a.)

After the District Court handed down its opinion, it granted Plaintiffs' request that an additional opportunity be afforded to file briefs on the question of monetary relief. In their brief on the subject, Plaintiffs attempted to assert the same kind of contentions as are presented to this Court. The District Court denied this request for monetary relief in terms which made clear that Plaintiffs had attempted to bolster their claims by taking language from the Opinion out of context:

> "I have carefully read your briefs and have found nothing to justify or warrant re-opening this case for further proof on damages. After carefully considering the record and balancing the equities of the matter, I arrived at the conclusion that a complete and adequate remedy, based upon all of the facts and inferences derived therefrom, would be afforded the plaintiff if Wellington Equity Fund was restrained from using the name 'Wellington' and Wellington Fund was declared to have the exclusive use of the name 'Wellington' in the investment company field. *This is the holding of the opinion and nothing more was intended or contemplated. No broader remedial base was stated or intended by this Court's opinion, and only reading certain paragraphs of the opinion out of context would warrant any other conclusion.*" (Emphasis supplied.)

The Defendants' Petition in No. 924 summarizes briefly the reasons why the use of the Wellington name by Wellington Equity Fund is entirely proper. There was an abundance of testimony by executives and directors of Wellington Fund as to why they and the other directors of Wellington Fund considered the use of the name by Wellington Equity Fund to be beneficial to Wellington Fund. There is not a scintilla of evidence in this record which suggests that Defendants did not, and do not, firmly and honestly hold these beliefs. The most critical thing that can be said of them is that they were mistaken as to the

rights of The Wellington Company in its own name and as to the consequences to Wellington Fund of the use of the name by Wellington Equity Fund.

One very curious anomaly exists as a result of the decision thus far reached in this case which Plaintiffs and the Courts below completely ignore and which not only casts considerable doubt on the validity of the decision on the existence of unfair competition but also eliminates any contention that Defendants were deliberate wrongdoers. The Wellington Company was the first of these companies to use the Wellington name. The Courts below have recognized and upheld, by necessary implication, its right to use the name. One of the usual attributes of such a right is the licensing of others to use it as well. In this case, the courts, at the behest of a junior user of the name, have denied The Wellington Company this customary right to permit others to use it. The result is, to say the least, unusual. It can not be said, however, that The Wellington Company deliberately attempted to appropriate something belonging to Wellington Fund when in fact it was merely authorizing the use of its own name which the courts recognize as properly belonging to it. The existence of the common industry practice of using similar names for mutual funds under the same investment management further negates the presence of any improper motive in the use of the name by Wellington Equity Fund. Defendants were not deliberate and intentional wrongdoers and the District Court did not find otherwise. The contentions of Plaintiffs, based upon a contrary premise, must again be rejected as they were by the Courts below.

Plaintiffs, in their petition, and even more so in their brief in opposition to Defendants' petition in No. 924, attempt to make it appear as if this were a case in which Morgan attempted *personally* and in his capacity as President and director of Wellington Fund to make a private profit for himself out of the use of the name by Wellington Equity Fund. The facts are that Morgan organized Welling-

ton Fund as a means of making the investment advisory services of his management company available to investors in search of the conservative investment objectives of a balanced fund; he has continued as the owner and a principal officer of the investment adviser and underwriter for the Fund as well as officer and director of the Fund; his actions in forming Wellington Equity Fund for investors in search of more aggressive objectives with greater attendant market risks were performed in his capacity as principal owner, officer and director of the adviser and underwriter and exactly paralleled his formation of Wellington Fund in 1928. While the Courts below have concluded that this action was wrong, Plaintiffs' efforts to make it appear that there has been self-dealing by an individual in a fiduciary capacity are wholly unjustified.

II. The Denial of an Accounting and Other Monetary Relief Was Fully Justified on the Record.

The District Court noted that, "Damages and profits need not be the invariable result of a finding of unfair competition" (524a), and declined to grant either. As to damages, the Court found:

> "The record is barren of facts tending to establish any monetary damages suffered by Wellington Fund by reason of the existence of Wellington Equity Fund." (524a)

As to profits, the Court determined:

> "There is no question Wellington Equity Fund's underwriting was enhanced by having the name 'Wellington'. It is, however, impossible to measure the amount of the enrichment. Any assessment based upon this item would be the product of rank speculation." (524a)

Further, the District Court thereafter reaffirmed the inappropriateness of monetary relief and an accounting after giving Plaintiffs a full opportunity to brief the subject (see p. 6, *supra*). The Court of Appeals affirmed these conclusions as being amply supported by the record.

Shortly before this suit was started, the net assets of Wellington Fund totalled about $750 million (5a). Published figures indicate that those assets are now in excess of $1.5 billion. This is compelling evidence that neither the existence of Wellington Equity Fund nor its use of the name have had any adverse effect on the sale of Wellington Fund shares.

The reference in the second quotation above to the enhancement of the Wellington Equity Fund underwriting by the use of the Wellington name again highlights the anomaly previously referred to. The right of The Wellington Company to use the Wellington name has been recognized by the Courts below. It is inescapable that The Wellington Company, as well as Wellington Fund, has goodwill which is symbolized by its own name. The only evidence in this record on the *significance* of the name indicated that the name had value as a symbol of investment management, i.e., the service performed by The Wellington Company (142a-143a, 145a, 161a, 185a-186a, 221a-222a, 411a-412a). Thus, the record will not permit an inference that there was any monetary advantage resulting from the use of Wellington as a symbol of the goodwill of Wellington Fund rather than of The Wellington Company.

This Court has consistently held that an accounting does *not* automatically follow an injunction and a finding of unfair competition; *Straus v. Notaseme Hosiery Co.*, 240 U. S. 179, 60 L. Ed. 590 (1916); *Champion Spark Plug Co. v. Sanders*, 331 U. S. 125 (1947). *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U. S. 203 (1942), cited by Plaintiffs, states the rule dealing with the burden of proof *after* an accounting has been ordered. The later decision in *Champion Spark Plug* pointed out that *Misha-*

waka was so limited and was not intended to indicate that an accounting was required in the event of a finding of unfair competition.

Plaintiffs had the burden of showing that Wellington Fund was damaged or that Defendants made a profit which they would not otherwise have made as a result of the unfair competition itself; *Q-Tips, Inc. v. Johnson & Johnson*, 206 F. 2d 144 (3rd Cir.), cert. denied, 346 U. S. 67 (1953). The findings of the District Court, which were affirmed by the Court of Appeals, demonstrate that Plaintiffs failed to meet this burden.

When Plaintiffs speak, in their Statement of the Question Presented, of the adviser and underwriter having "profited by unlawful appropriation", they assume a fact that was adversely decided by the Courts below. There was no finding of profit resulting from the unlawful appropriation and none could have been made on the facts. The denial of monetary relief was therefore mandatory and Plaintiffs present no question on this phase of the case calling for review by this Court.

III. Plaintiffs' Contentions as to the Issue of Unfair Competition Are Unsound But That Issue Should Be Reviewed by This Court by Granting Defendants' Petition.

While Plaintiffs' distortions of Defendants' arguments relating to the existence of unfair competition have no direct bearing on their petition for review of the denial of monetary relief, Defendants are obliged to speak to these errors lest they create an erroneous impression of the true issues both here and in Defendants' petition in No. 924.

Plaintiffs have taken phrases out of context from the testimony, from Defendants' briefs in the District Court and from the opinion of the District Court in an effort to demonstrate that Defendants' position with respect to the right to use the Wellington name is based on the proposition that Wellington Fund is a "corporate shell".

Nothing could be further from the truth. In an effort to establish that Defendants still assert a "corporate shell" thesis, Plaintiffs present, in a footnote, excerpts from Defendants' petition in No. 924 (Pet. p. 13, n. 22). The sense of those excerpts can be summarized as follows:

1. The Courts below have not indicated the goods, services or business activity with respect to which *Wellington Fund* has used the name.

2. The only services offered in the mutual fund market place are those of the adviser-sponsor.

3. The Wellington name signifies to investors the advisory and sales services available in that market place.

4. Wellington Fund obtains no direct financial benefit as a result of the sale of shares.

5. Wellington Fund cannot make any other use of the name nor realize monetary benefit from it.

6. The Fund engages in no business activity in this market place; the adviser-sponsor does.

7. This case involves alleged unfair competition which deals with conduct in the market place, and principles of corporate law have no bearing.

Each of the foregoing, with the exception of the last, is a *factual* assertion having to do with the true nature of the business activity conducted in the market place in which mutual fund shares are sold. This is the *only* place where the Wellington name has any significance. Neither Plaintiffs nor the Courts below have met these factual assertions and attempted to show, based upon this record, wherein they are incorrect. The District Court brushed these factual assertions aside, stating that "Wellington Fund is not the corporate shell defendants would have this Court find" (473a), that Defendants urge "that the corporate veil of Wellington Fund be pierced" or "that special principles be held applicable to investment

companies" (476a), that if Defendants' suggestions were adopted, "the corporate concept would receive a serious setback" (499a), that "The law is not ready to assimilate the sophisticated nuances advanced by Defendant" (499a) and that, since Defendants have chosen to conduct their affairs in the corporate form, no exception should be made "which would permit defendants to function outside the carefully delimited boundaries of corporate law" (477a).

A contrasting of what Defendants have said here, as summarized above, with what the District Court said about these contentions and with Plaintiffs' characterization of them as a thesis that Wellington Fund is a "corporate shell", demonstrates that Plaintiffs and the District Court have misconceived not only the arguments but also the true issues in the case. The Court of Appeals for the Third Circuit did not make these particular errors; however, as the Defendants have pointed out in their petition in No. 924, that Court erred factually and legally in basing its decision on a concept of "public image".

Defendants are charged with contending that fund directors have no real functions and should have no independence (presumably from the investment adviser and underwriter).[3] Defendants have never so contended.

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3. A flagrant instance of taking words out of context appears in footnote 19, p. 11, of Plaintiffs' petition where they quote from the following portion of one of Defendants' briefs in the Court of Appeals, but *without* the final clause which we have here underlined:

> ". . . Congress obviously approved this view. It did not intend to approve the system of advisory contracts with professional managers on the one hand and to destroy it in effect, on the other, by requirements of independence on the board of directors *which might imply obligations to second guess the day by day advice of the adviser.*"

There is a vast difference in the meaning between the full sentence and the portion quoted by Plaintiffs. Further, the word "independence" was used in that context as a synonym for lack of affiliation as that term is used in the Investment Company Act for 1940, 15 U. S. C. 80a-1 'et seq., and we were there discussing the requirements in the Act for numerical "independence" and not with whether or not individual directors were independent in their thinking and judgment.

Fund directors do have duties and responsibilities, and the directors of these Funds fully discharge those duties. They are not, however, professional investment advisers, except for the affiliated directors who are a minority of the Board, and they do not as a Board purport personally to perform the professional investment advisory services which are supplied for a fee by the adviser pursuant to contract approved by the shareholders of the Funds.

Plaintiffs say that Defendants incorrectly argued that their position was approved by the Securities and Exchange Commission. Section 35(d) of the Investment Company Act of 1940, 15 U. S. C. 80a-34(d), makes it unlawful to use as part of the name of an investment company words which the Commission finds and by order declares to be misleading and deceptive. We have argued that the inaction of the Commission in the face of the many similarly named funds under common management and the demand by Plaintiffs that the registration of Wellington Equity Fund shares be denied, is a clear indication that there is nothing misleading, deceptive or confusing in this practice. In its brief, *amicus curiae*, in the Court of Appeals, the S. E. C. said:

> "Under Section 35(d) the Commission has refused to permit investment companies to adopt names which the Commission believes might mislead prospective investors to buy into a different type of fund from that implied by the name, and, on occasion, has refused to permit a name to be used which might induce investors to believe they were buying into an existing fund with a similar name. But the fact that the Commission has raised questions only where the misleading nature of the name would injure prospective investors of the fund seeking to adopt the name cannot be deemed an interpretation by the Commission that this is the sole purpose of Section 35(d)." (Page 20)

The necessary implication of this statement is that the S. E. C. *does* believe that the similar naming of Funds

under these circumstances is *not* misleading or deceptive. "Misleading" and "deceptive" embrace "confusing", and if there is no likelihood of confusion, there can be no unfair competition.

A great deal has been written recently about the mutual fund industry and all too frequently resort has been had to characterization and condemnation by adjective and epithet[4] rather than to sound analysis. The errors in

4. For example, the student comment in 71 Yale L. J. 137 (1961), *The Mutual Fund and Its Management Company: An Analysis of Business Incest*, condemns by the choice of words for the title. Plaintiffs quote the following from *A Study of Mutual Funds, Prepared for the Securities & Exchange Commission by the Wharton School of Finance & Commerce*, H. R. Rep. #2274, 87th Cong. 2d Sess. (1962):

> ". . . This pervasive interpenetration of executive personnel, taken in conjunction with the fact that open-end companies are almost invariably organized by a management group associated with the adviser, and the present limitations on the role of independent directors, suggests that open-end investment companies are typically legal shells without genuine autonomy, controlled by external management interests." (page 67)

The following discussion of this paragraph by Lobell, *A Critique of the Wharton School Report on Mutual Funds*, 49 Va. L. R. 1, 14-16 (1963), demonstrates how the language selected creates an erroneous impression of the true facts:

> "The conclusion is a semantic triumph. For while it does no more than summarize what went before, it succeeds in representing the data with overtones seeming to say much more than is said in fact. Thus:
>
> a. The personnel of the fund are 'extensively interpenetrated' by personnel of the adviser—a statement with fifth-column overtones.
>
> b. Further, the fund is organized by 'a management group associated with the adviser.' One could say simply that 'advisers form funds.' However, the manner of expression actually used implies that in doing so the adviser hides behind the cloak of 'a management group associated' with him.
>
> c. All this is compounded by the 'present limitations on the role of independent directors' of funds. 'Present' implies that perhaps it was not once so or that one day it might not be so. But all the evidence we have is that fund directors have never been different or acted differently from the way they do now. There is no evidence that any groups of honest, reasonable and

the result here which stem from a misunderstanding of the mutual fund, its origin, function and method of operation add fuel to this fire.

Plaintiffs point out that this Court has not decided a case involving an investment company and they urge that

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alert men would have acted differently. And there is no evidence that changing the present role of fund directors would benefit investors either by improving performance of funds or by reducing the cost of their service. 'Limitations' on independent directors implies the imposition of bars to complete fulfillment of their functions. Yet there is no evidence (other than irrelevant considerations adduced by the authors of the report in material we shall consider later) that fund directors are ineffectual under any sensible standards—whether under the 'shell' theory of mutual funds or under standards normally applicable to corporate directors. What standards *are* sensible we shall discuss in a later section of this Article. Certainly they do not embrace the substitution of the 'independent' director for the advisory organization in the day-to-day operation of the fund and (contrary to what is implied here and elsewhere in the report) do not require the concept of 'arm's length bargaining' with the adviser on the question of fees to be interpreted to mean 'swords-point combat' with him.

d. 'Legal shells without genuine autonomy' connotes that funds are 'fronts' for the effectuation of the purposes (perhaps dire) of others, and certainly implies that it could be otherwise. It intimates that if the adviser-fund contract relation could be severed and advisory personnel hired by the fund at a salary, the fund would become imbued with a personality and reality it now lacks. If that could happen, the implication is, it would somehow be a good thing for the investor. As metaphysics this is nonsense. The fund becomes no 'realer' by virtue of 'internal' as against 'external' management. And if it did, that 'reality' would have no bearing (except perhaps adverse) on its ability to serve the investor. The report contains no evidence to the contrary.

e. 'Control by external management interests' connotes control by 'outsiders' through a facade of 'insiders'. Who are these outside interests? They are nothing more or less than the men who founded the fund, who bore the labor and losses of its growth, who built its portfolio and performance record, who supervise its investments constantly, who have both direct positions with the funds and the accompanying liabilities and responsibilities, who serve at a fee which the typical shareholder cannot match in any other type of professional supervision and who hope, by doing their jobs well, to make a profit from the fee paid."

a review of Defendants' contentions with respect to the existence of unfair competition will result in a decision of significance in other pending mutual fund cases (Pet. pp. 15-16). To this extent we join with Plaintiffs. Since the case involves a charge of unfair competition, its proper resolution depends upon an understanding of the nature of the mutual fund industry. A decision by this Court on the issue of unfair competition should go far to chart correctly the course of other controversies involving mutual funds, their advisers and sponsors.

Defendants have contended throughout this case that Wellington Fund realizes no direct monetary benefit from the use of the Wellington name in the mutual fund market place. While Petitioners quarrel with this assertion, both they and the District Court have impliedly recognized the correctness of it. Wellington Equity Fund is the entity held to have improperly used the name in this market place, yet Plaintiffs seek *no* monetary recovery from it (Pet. p. 7, ft. nt. 13), and the Courts below gave no *serious consideration to the possibility that* Wellington Equity Fund may have profited from the use of the name. This indicates not only that the mutual fund obtains no benefit from the use of the name in the market place, but also that the entire predicate of the Plaintiffs' case, i.e., a business interest on the part of the fund in the transactions in this market place, is lacking.

Other members of the Plaintiffs' family group (28a-29a) recently instituted a suit[5] against the directors of Wellington Fund, Wellington Equity Fund and the Wellington advisory and underwriting companies in which Plaintiffs' counsel allege that the Defendants violated obligations owing to Wellington Fund by causing it "to grow to an enormous and unwieldly size to increase the advisory fees and underwriting commissions payable to the" various Defendants. It is thus asserted by these same

5. *Gardner, et al. v. Morgan, et al.*, Civil Action #32834 in the United States District Court for the Eastern District of Pennsylvania.

counsel on behalf of this same family group that the sale of fund shares is a wrong to Wellington Fund; yet the premise of Plaintiffs' case here must be that Wellington Fund has goodwill in this market place wherein fund shares are sold which must be protected in order to insure further sale of Wellington Fund shares. These two positions are diametrically opposed and the facility with which Plaintiffs' counsel are able to shift from one to the other demonstrates, among other things, the lack of substance to the proposition that the Fund itself has a substantial direct monetary interest in the business conducted in this market place.

CONCLUSION.

The denial of monetary relief by the Courts below was proper and raises no question for review by this Court. The issue as to whether there has been unfair competition here does present a question which this Court should decide. That issue is raised by Defendants' petition in No. 924.

Respectfully submitted,

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